Supreme Court, U.S.
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No. 00-1604

In The

Supreme Court of the United States

BROWN & WILLIAMSON TOBACCO CORPORATION,
AS SUCCESSOR BY MERGER TO THE
AMERICAN TOBACCO COMPANY,

Petitioner,

v.

GRADY CARTER AND MILDRED CARTER,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In an attempt to divert attention away from the Florida Supreme Court's critical misapplication of the preemption provisions of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1334, and this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), respondents have sought to reinvent the Florida Supreme Court's ruling and the factual record in this case. However, respondents' mischaracterization of the facts cannot diminish the legal errors made by the Florida Supreme Court when it upheld the trial court's admission of respondents' package insert and their expert's testimony that such an insert should have been included in cigarette packages to provide additional health warnings to cigarette smokers without regard to any limitation to the pre-July 1, 1969 time period, as the FCLAA and *Cipollone* require. The Florida Supreme Court compounded this violation of federal law by affirming the trial court's ruling allowing the jury to impose liability on petitioner based on expert testimony that such an insert should have been included in cigarette packages after July 1, 1969, again in contravention of the FCLAA and *Cipollone*.

I. THE FLORIDA SUPREME COURT VIOLATED THE FCLAA AND *CIPOLLONE* BY UPHOLDING THE ADMISSION OF EVIDENCE THAT ADDITIONAL CIGARETTE HEALTH WARNINGS SHOULD HAVE BEEN PROVIDED TO RESPONDENTS OTHER THAN THE HEALTH WARNINGS MANDATED BY CONGRESS.

Respondents attempt, in their opposition, to disassociate the verdict from the strategy that achieved it,

i.e., their attack on the adequacy of all the cigarette health warnings Congress ever mandated, including those in the preempted post-1969 era. Respondents' efforts do not, however, alter the fact that at trial, respondents elicited testimony from their expert, Dr. Allan Feingold, that his proposed package insert should have been utilized by petitioner to warn cigarette smokers of the health risks of smoking at all times – *i.e.*, both before and after July 1, 1969.

Respondents erroneously contend, *inter alia*, that (1) the trial court ruled that Feingold's testimony was admissible as evidence of a health warning for the pre-1969 time period, but not after 1969 (Br. in Opp. 2); (2) the trial court held that respondents' claims were limited to injuries allegedly sustained as a result of a pre-1969 failure to warn (Br. in Opp. 2); (3) Feingold never expressly stated that his package warning insert should have been employed after 1969 (Br. in Opp. 5); and (4) respondents stipulated at trial that their failure to warn claim was limited to petitioner's pre-1969 conduct. Br. in Opp. 6.

These "contentions" are not supported by the Florida Supreme Court's decision. At no point did the trial court rule, or did the Florida Supreme Court hold, that Dr. Feingold's package insert and his testimony thereon were limited to the nonpreempted, pre-1969 time period. On the contrary, all the trial court did (and all the Florida Supreme Court approved) was to overrule petitioner's objection that the package insert and its attendant testimony violated the FCLAA's preemption provisions, as interpreted by *Cipollone*. (Rec. 45:1157-60.) Feingold was then permitted to testify about petitioner's alleged failure to warn of the health risks of smoking, and utilize his

package insert, without ever limiting that testimony to the pre-1969 era. (Rec. 49:1536-47.) Since petitioner's objection was *overruled*, respondents' assertion that the package insert and the testimony about it was *limited* to the pre-1969 era misrepresents the legal rulings made below.

Similarly, neither the trial court nor the Florida Supreme Court ever made any "factual determination" (Br. in Opp. 2, 3) that the respondents' claims were limited to injuries arising from pre-1969 conduct. First, despite respondents' attempt to (mis)cast the issue as merely implicating a factual dispute, this "determination" would necessarily constitute a legal, not factual, ruling based on the dictates of the FCLAA and *Cipollone*. But no legal determination was ever made (either by the trial court or the Florida Supreme Court) that "[respondents'] claims were clearly limited to injuries that resulted from petitioner's failure to provide adequate warnings *prior* to July 1, 1969." Br. in Opp. 2. On the contrary, the trial court specifically *refused* to make such a determination, leaving the issue for the jury to decide, and the Florida Supreme Court upheld this decision.

Second, petitioner's objections to the package insert and the expert testimony about it were based on these very grounds, *i.e.*, that under § 1334(b) and *Cipollone*, respondents' failure to warn claims should be confined to the pre-1969 time period. (Rec. 45:1158.) These objections, of course, were overruled. (Rec. 45:1160.) It is untenable and disingenuous for respondents to now dress themselves in the robes of *Cipollone* and the FCLAA, when petitioner's motion for partial summary judgment based

on preemption was denied, and when the trial court overruled petitioner's objections to the package insert.

In fact, were respondents to examine the record with an unjaundiced eye, they would concede that they attacked the adequacy of the post-1969 health warnings from the very commencement of trial until its close. In his opening statement to the jury, respondents' counsel attacked the adequacy of the warning prescribed by the 1969 amendments to the FCLAA:[1] "[T]hat just says it's dangerous, but it doesn't say how much. It doesn't say what or how, whatever." (Rec. 38:399.) While displaying to the jury the names of over thirty (30) carcinogens unknown until 1989 (Rec. 38:396; *see also* Rec. Pl. Exh. 21, 1989 Surgeon General's Report, at 85-87) and all the warnings mandated by Congress in 1965, 1969 and 1984 (Rec. 38:398-99), counsel advised the jury: "Known carcinogens . . . that have *never* been put on the label"; "Why hasn't it *ever* been put on the label?"; "There is no excuse"; "It's been hidden largely and it's *never* been publicized." (Rec. 38:396) (emphasis added).

Respondents' expert, Dr. Feingold, thereafter testified that all the warnings ever mandated by Congress were inadequate. Those warnings required in 1966, for example, were "very inadequate." (Rec. 48:1501-02.) "It was not until 1984," Feingold testified over objection, that

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[1] The 1969 FCLAA required the following warning to be placed on all cigarette packages sold in the United States: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Pub. L. 91-222, 84 Stat. 87 (1970).

the word "cancer" was required in the federally-mandated warnings (Rec. 48:1507-08), and that no package insert has "ever" been utilized which "discusses the dangers of cigarettes in detail." (Rec. 48:1509.) To remedy these "inadequate" warnings, including those appearing on cigarette packages after July 1, 1969, Feingold commended to the jury his package insert, which he described as "what I would like patients to be confronted with when they open a package of cigarettes." (Rec. 49:1536.) The package insert (*see* Pet. App. 48a-54a) contained far more warning information than Congress has ever required. Via the package insert, Feingold advised warning that, *inter alia*, quitting smoking does not eliminate health dangers, that filtered and low-yield cigarettes do not prevent disease, and that cigarette smoking should be limited. Pet. App. 51a, 53a. The insert also listed the chemicals purportedly in cigarette smoke and instructed people how to smoke. Pet. App. 51a, 54a.

Of critical import, of course, is the fact that nowhere in Feingold's testimony about the package insert, or in the insert itself, was there even a suggestion that the package insert was required only in the pre-1969 time period. Neither respondents' counsel nor their expert witness ever provided any time limitation in their attacks, using the insert, on petitioner's alleged failure to warn. It is therefore pure sophistry for respondents to argue that "the jury could not possibly have been confused on the temporal limit of the [respondents'] failure-to-warn claim." Br. in Opp. 6. While the jury may have been instructed that it was not to find liability based on petitioner's alleged failure to warn through its advertising or promotion after 1969 (Pet. App. 20a), the trial court also

permitted the jury to receive evidence about petitioner's alleged warning failures that stretched far beyond July 1, 1969, and that condemned the post-1969 federally-mandated warning labels. The court's refusal to enforce the preemptive effect of the FCLAA and *Cipollone*, which was affirmed by the Florida Supreme Court, constituted legal error, notwithstanding, or perhaps because of, the court's instruction.

Indeed, this legal error was only exacerbated when the trial court permitted the jury to determine whether the package insert was a form of "advertising" or "promotion" as defined by the FCLAA, rather than deciding the issue as a matter of law, as a myriad of other courts have done. *See* Pet. 16-21. While the jury instruction merely informed the jury that there was no claim after 1969 that petitioner should have included "additional or more clearly stated warnings in the advertising or promotion of its cigarettes" (Pet. App. 20a), the trial court's decision that "a genuine issue of material fact exist[ed] regarding the general usage of the terms 'advertising or promotions' " (Pet. App. 46a) compelled it to submit the interpretation of those terms to the jury. When the Florida Supreme Court upheld that ruling, it insured that the instruction's only effect would be to permit the jury to decide the preemptive effect of the FCLAA with regard to respondents' package insert. Thus, the court's instruction, rather than limiting respondents' failure to warn claim to the pre-1969 era, instead gave the jury the authority to determine whether the package insert even fell within the preemption ambit of the FCLAA and *Cipollone*. This was clear error, as it failed to give proper effect to the preemptive effect of federal law.

Respondents, realizing the court's error, now state that the trial court's ruling that the meaning of "advertising" or "promotion" was a question of fact "never became relevant at trial, because [respondents] did not contend that the hypothetical package insert was not 'advertising or promotion.' " Br. in Opp. 9, n.1. On what ground, then, was petitioner's objection to the package insert and to Feingold's testimony overruled? Respondents' contention is simply a gross mischaracterization.

Indeed, respondents' claim that the denial of petitioner's motion for partial summary judgment based on preemption "had nothing to do with package inserts" (Br. in Opp. 9) is palpably untrue. In their opposition to petitioner's motion, respondents claimed that there were "numerous methods of communication that are not advertising or promotion of cigarettes," and listed, *inter alia*, "[o]ther methods of communication that are the subject of expert testimony." (Rec. 4:484-85.) *Respondents then attached as an exhibit to their opposition to petitioner's motion for partial summary judgment the very same package insert that they introduced at trial.* (Rec. 4:478-608, App. V.) In addition, in the interrogatory responses they used to oppose petitioner's motion, respondents stated that "[t]he above warnings," including the information presented on the package insert, "should have been given *on packages of cigarettes [or] in packages via printed inserts,*" without limitation to the pre-1969 time period. (Rec. 4:487.)

Accordingly, any present assertion by respondents that they did not cast the package insert as outside the FCLAA's definition of "advertising" or "promotion" is simply an attempt to distance the verdict from their own

strategy, as well as from the legal errors that contributed to it.

II. THE FLORIDA SUPREME COURT'S RULING THAT UPHELD THE TRIAL COURT'S DECISION ADMITTING THE PACKAGE INSERT AND PERMITTING THE JURY TO DECIDE THE PREEMPTIVE SCOPE OF THE FCLAA DIRECTLY CONFLICTS WITH THE FCLAA, *CIPOLLONE*, AND ESTABLISHED CASE LAW.

Respondents argue that, at most, the Florida Supreme Court merely "misapplied *Cipollone* when it allowed the jury to consider post-1969 evidence." Br. in Opp. 10. This again misstates the rulings of that court and the effect of those rulings. The Florida Supreme Court did not simply "misapply" the dictates of *Cipollone* and the FCLAA. Rather, it completely ignored those dictates by upholding the trial court's ruling permitting the jury to hear evidence without limitation to the pre-1969 time period, and compounded that error by affirming the trial court's ruling allowing the jury to determine whether that evidence constituted "advertising" or "promotion" within the meaning of the FCLAA. This directly contravenes not only *Cipollone*, but other state and federal courts that have directly confronted this issue.

Respondents urge that the Florida Supreme Court's decision does not conflict with *Cipollone* and its progeny because none of those cases addressed the admissibility of expert testimony concerning a package insert warning. Br. in Opp. 11. However, the issue before this Court is not only whether a state's highest court approved the admission of a package insert and accompanying testimony

that challenged the adequacy of post-1969 federally-mandated warnings (although this error conflicts with well-established preemption precedent and alone warrants review). The issue that also merits review is the Florida Supreme Court's submission of the FCLAA's interpretation to a jury.

As the petition details, it is the duty of courts, not juries, to enforce this Court's interpretation of federal law. Pet. 22-23. Petitioner has cited various federal and state court cases in which the interpretation of the FCLAA has been undertaken by these courts as a matter of law, in consonance with this Court's action in *Cipollone*. Pet. 16-21. In none of these cases, and in no case proffered by respondents, did a court determine that the construction of § 1334(b) presented a fact issue for jury resolution. Rather, as these and other cases hold, the interpretation of the applicability of a federal preemption provision must be accomplished by a court. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 214 (1985); *Penn Adver. of Baltimore, Inc. v. Mayor & City Council*, 63 F.3d 1318, 1322 (4th Cir. 1995), *vacated on other grounds*, 518 U.S. 1030 (1996).

Permitting a jury to determine the scope of the FCLAA is not a mere "misapplication" of *Cipollone* and its progeny. It is instead a gross dilution of the Congressional policy underlying the statute. The preemptive scope of the FCLAA is governed entirely by Congressional intent. *See Cipollone*, 505 U.S. at 516-17. Congress's intent in enacting the FCLAA was to impose uniform warning obligations with respect to cigarette advertising and promotion. *See* 15 U.S.C. § 1331. By leaving the FCLAA's construction to the jury, the Florida Supreme

Court enabled that jury to vitiate Congress's policy of nationally-uniform warning obligations by imposing additional warning requirements with respect to cigarette advertising and promotion after July 1, 1969. This violation of Congressional intent and, indeed, the Supremacy Clause, is not simply a misapplication of a well-settled rule of law. Rather, the Florida Supreme Court's decision effectively tramples on long-standing federal policy set out in the FCLAA, and in so doing "conflicts with [a] relevant decision[ ] of this Court" (Sup. Ct. R. 10(c)), namely, *Cipollone*.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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